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Supreme Court, U. S.
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No. .....
IN THE

Supreme Court of the United States

October Term, 1980

KAREN J. SPEIRS and FIRST NATIONAL BANK OF NEVADA, successor Trustee for KAREN J. SPEIRS,

Petitioners,

vs.

BANK OF NEVADA and DIANE CRANDELL COULTHARD, coexecutors of the ESTATE OF GEORGE WILLIAM COULTHARD, Deceased,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEVADA.

PETITION FOR WRIT OF CERTIORARI.

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BANK OF NEVADA and DIANE CRANDELL COULTHARD, coexecutors of the ESTATE OF GEORGE WILLIAM COULTHARD, Deceased,

Respondents.

Questions for Review.

(1) Whether the Supreme Court of the State of Nevada denied Petitioners a fair hearing in a fair tribunal by failing to have a disinterested District Court Judge designated by the Governor of the State of Nevada sit in place of a partial Chief Justice as required by both the Constitution and statutes of the State of Nevada.

(2) Whether the Supreme Court of the State of Nevada denied Petitioners a fair hearing in a fair tribunal by failing to request the Governor to designate an entire new tribunal after a partial Chief Justice had participated in the proceedings which resulted in a reversal of the judgment of the trial court.

Parties to Proceedings.

The names of all parties to these proceedings are contained in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI.

To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

KAREN J. SPEIRS AND FIRST NATIONAL BANK OF NEVADA, successor Trustee for Karen J. Speirs, the Petitioners herein, pray that a Writ of Certiorari issue to review the Judgment of the Nevada Supreme Court entered in the above-entitled case on December 13, 1979, and the subsequent orders denying rehearing entered on June 4, 1980 and July 3, 1980.

Opinions Below.

(1) The Opinion of the Nevada Supreme Court is reported as 603 P.2d 1074 (1979) and is printed in Appendix A, attached hereto, *infra*, page 1. The unreported Order of the Nevada Supreme Court entered on June 4, 1980, denying the first Petition for Rehearing of Petitioners and wherein Chief Justice Mowbray removed himself from participating is printed in Appendix A, attached hereto, *infra*, page 8. The unreported Order of the Nevada Supreme Court entered on July 3, 1980, denying Petitioners second Petition for Rehearing and Respondents' first Petition for Rehearing is printed in Appendix A, attached hereto, *infra*, page 9.

Jurisdiction.

The Opinion and Judgment of the Nevada Supreme Court (Appendix A, *infra*, page 1) was entered on December 13, 1979. Two timely Petitions for Rehearing were filed by Petitioners and were denied on June 4, 1980 and July 3, 1980, respectively. (Appendix A, *infra*, pages 8 and 9.) The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1257 (3).

Statutes Involved.

The case involves the following statutes:

(1) The first section of the Fourteenth Amendment of the Constitution of the United States, which provides as follows :

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) Article Sixth, Section Four, of the Nevada Constitution, which provides, in part, as follows:

> In case of the disability or disqualification, for any cause, of the Chief Justice or one of the associate justices of the Supreme Court, or any two of them, the Governor is authorized and empowered to designate any district judge or judges to sit in the place or places of such disqualified or disabled justice or justices, and said judge or judges so designated shall receive their actual expense of travel and otherwise while sitting in the Supreme Court.

(3) Section 1.225 (5) of the Nevada Revised Statutes, which provides as follows:

> 5. Upon the disqualification of a justice of the Supreme Court pursuant to this section, a district judge shall be designated to sit in his place as provided in Section Four of Article Six of the Constitution of the State of Nevada.

Statement of the Case.

Consolidated appeals were taken from a judgment entered on December 29, 1977, by the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark. The appeals to the Supreme Court of the State of Nevada were taken from a judgment imposing a constructive trust for the benefit of KAREN J. SPEIRS, Petitioner herein, upon a 12.5 percent interest in real property known as the Horseshoe Club Hotel & Casino in Las Vegas, Nevada, and money damages.

The trial court had determined that Respondent, GEORGE WILLIAM COULTHARD, during his lifetime had acted improperly in discharging his responsibilities as trustee for his daughter, Petitioner, KAREN J. SPEIRS, and impressed a constructive trust upon the mentioned interest in the Horseshoe Club which Coulthard had acquired in his own name and which the co-executors of his estate, Respondents BANK OF NEVADA and DIANE CRANDALL COULTHARD, now hold. The co-executors appealed from that determination. Petitioner SPEIRS and Petitioner FIRST NATIONAL BANK OF NEVADA, successor trustee for KAREN J. SPEIRS, also noticed an appeal from a portion of the judgment concerning money damages.

On December 13, 1979, the Supreme Court of the State of Nevada rendered its Decision reversing the trial court's decision and directing that judgment be entered in favor of Respondents BANK OF NEVADA and DIANE CRANDALL COULTHARD. The decision of the Nevada Supreme Court is reported at 603 P.2d 1074 (Nev., 1979), and a copy is included in the Appendix attached hereto at page 1, *infra*. The Decision of the court was authored by Justice Thompson, and concurred in by Chief Justice

Mowbray, and Justices Manoukian and Batjer. A dissenting opinion was rendered by Justice Gunderson.

On December 27, 1979, a Petition for Rehearing was filed on behalf of Petitioner SPEIRS. The Petition for Rehearing focused upon the failure of the court to render a decision in conformity with the facts as determined by the trial court, and its misapplication of the law as a consequence thereof. The petition further alleged that the Supreme Court proceeded to enter certain findings of fact which were directly contrary to the findings of the trial court, and as a result, violated the long-standing holdings of the court which held that if the evidence adduced in the trial court, though conflicting, can be read to support the findings of fact, then the appellate court must accept the trial court's determinations.

More importantly, in conjunction with Petitioner's Petition for Rehearing, a Motion to Disqualify Supreme Court Chief Justice John Mowbray was filed on January 3, 1980. The motion sought an order of the court disqualifying Chief Justice Mowbray from hearing the Petition for Rehearing on the grounds that his bias in favor of the Respondents herein precluded Petitioner SPEIRS from obtaining a fair and impartial hearing upon the Petition for Rehearing. This was the first and only such motion made by the Petitioner in the entire proceedings.

Together with the Motion to Disqualify, certain affidavits were submitted factually establishing the bias alleged on the part of Chief Justice Mowbray. The first was the affidavit of Petitioner SPEIRS who stated that Chief Justice Mowbray was a close and intimate friend of her father, G. WILLIAM COULTHARD, but that she was not aware that Chief Justice Mowbray was involved in the determination of the appeal until such time as she received a copy of the decision filed by the court on December 13, 1979. Her affidavit further

related that she had first met the Chief Justice when he had performed her wedding service at the residence of her father and his wife, Respondent, DIANE CRANDALL COULTHARD. At that time, Petitioner's father had informed her that the Chief Justice was performing the wedding ceremony at his request because they were good friends.

The second affidavit filed in support of Petitioner SPEIRS' Motion to Disqualify Chief Justice Mowbray was that of ELSIE HUSSEY, who was the executive secretary to Petitioner's father, G. WILLIAM COULTHARD, from 1952 until the time of Mr. Coulthard's death in 1972. Mrs. Hussey stated in her affidavit that during her twenty-year relationship with Mr. Coulthard, she was well-acquainted with Mr. Coulthard's personal affairs; that Mr. Coulthard knew Chief Justice Mowbray and the relationship was a warm and close one; that Mr. Coulthard and Chief Justice Mowbray were dear friends up to the time of Mr. Coulthard's death, and that the two saw each other socially on many occasions

On June 4, 1980, in response to the Motion to Disqualify, the Nevada Supreme Court entered an Order noting that Chief Justice Mowbray had voluntarily disqualified himself from participating in the resolution of the Petition for Rehearing, and thereby declared moot the Motion for Disqualification filed by Petitioner SPEIRS. Consequently, the Order denied the Petition for Rehearing. A copy of said Order of June 4, 1980, is included in the Appendix at page 8, *infra*.

On June 11, 1980, in response to the Nevada Supreme Court's Order of June 4, 1980, Petitioner SPEIRS again filed a Petition for Rehearing asking the court to reconsider the Order of June 4, 1980, on the following grounds:

> (1) That upon Chief Justice Mowbray having voluntarily declined to participate in a resolution of the

Petition for Rehearing in response to the Motion for Disqualification, the panel which heard said petition was jurisdictionally defective pursuant to Nevada Revised Statute 1.225(5) in that a district judge was not designated to sit in his place and stead; and

(2) That by virtue of Chief Justice Mowbray's voluntary disqualification, and the resulting implication of bias and partiality, the previous decision of the Nevada Supreme Court reversing the trial court judgment was void.

Additionally, Petitioner SPEIRS' second Petition for Rehearing relied heavily upon Nevada Revised Statute 1.225 which provides the grounds and procedure for disqualifying a justice of the Nevada Supreme Court. N.R.S. 1.225(5) provides as follows:

> Upon the disqualification of a justice of the Supreme Court pursuant to this section, a district judge *shall* be designated to sit in his place as provided in Section Four of Article Six of the Constitution of the State of Nevada. (Emphasis supplied).

In response to Petitioner SPEIRS' Motion to Disqualify, Chief Justice Mowbray voluntarily declined to participate. Consequently, it was mandatory for a district court judge to be designated to sit in his place and stead for the purpose of participating in the deliberations of the court in deciding the original Petition for Rehearing. Petitioner SPEIRS alleged that since this was not done, the court was denied the imput of a district judge as required by N.R.S. 1.225(5). Therefore, the Nevada Constitution, and statutory law enacted thereto, mandated the granting of the original Petition for Rehearing, which rehearing should include a district judge designated to sit in the place and stead of Chief Justice Mowbray, or in the alternative, an entire new panel, free from the appearance of bias and partiality, appointed to consider the merits of the original Petition for Rehearing.

On July 3, 1980, an Order was entered by the Supreme Court of the State of Nevada denying Petitioner SPEIRS' second Petition for Rehearing. A copy of said Order is included in the Appendix at page 9, *infra*. Said Order was signed by Justice Thompson, Manoukian and Batjer. Following the entry of this Order, and on July 11, 1980, a final remittitur was directed to the lower court. This Petition for Writ of Certiorari was submitted praying that this Honorable Court issue said Writ to review the Judgment of the Supreme Court of Nevada denying Petitioner SPEIRS' Petitions for Rehearing.

REASONS FOR GRANTING THE WRIT.

Initially, this action was concerned with far-reaching principles of trust law and the duties and obligations of fiduciaries that arise from the application of those principles. Without asking this Honorable Court to undertake to examine the merits of the underlying action itself, Petitioner SPEIRS would respectfully note, however, that the decision of the Supreme Court of Nevada reported at 603 P.2d 1074 (Nev., 1979) established a new and dangerous principle of trust law by holding that if a trust agreement allows the trustee discretion in investing in properties of the trustee's choosing, the trustee is exonerated as a matter of law from being held responsible for any mistakes or breaches of his fiduciary duties. Moreover, the impact of this decision is substantial; this action involves millions of dollars worth of hotel and casino property in Las Vegas, Nevada, and thus the final resolution will have a tremendous effect on the immediate parties hereto and the community at large.

Yet, it is not the underlying merits of Petitioner SPEIRS' claim which she now seeks this court to review; to the contrary, it is the *manner and procedures* which the Supreme Court of Nevada utilized in rendering its decision that Petitioner now questions. It is the Petitioner's contention that in ruling on her Petitions for Rehearing, the Supreme Court of Nevada failed to conform its procedures to the mandates of the Nevada Constitution and Nevada Revised Statute 1.255(5) enacted pursuant thereto, and thus denied Petitioner substantial property rights without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

In 1957, the Nevada Legislature enacted N.R.S. 1.255 to clarify the grounds and procedure for disqualifying Su-

preme Court justices. The relevant provisions of that statute are as follows:

> (1) A justice of the Supreme Court shall not act as such in an action or proceeding when he entertains actual bias or prejudice for or against one of the parties to the action. . . .
>
> (3) A justice of the Supreme Court, upon his own motion, may disqualify himself from acting in any matter upon the ground of actual or implied bias.
>
> (4) Any party to an action or proceeding seeking to disqualify a justice of the Supreme Court for actual or implied bias shall file a charge in writing, specifying the facts upon which such disqualification it sought. Hearing on such charge shall be had before the other justices of the Supreme Court.
>
> (5) Upon the disqualification of a justice of the Supreme Court pursuant to this section, *a district judge shall be designated to sit in his place as provided in Section Four of Article Six of the Constitution of the State of Nevada*. (Emphasis supplied)

In the event of a disqualification of a Supreme Court justice, the procedure set forth in N.R.S. 1.225(5) must be followed. In the instant case, this was not done. In response to Petitioner's Motion for Disqualification, Chief Justice Mowbray of the Nevada Supreme Court declined to participate in the resolution of the Petition for Rehearing. Subsequently, no district judge was designated by the Governor to sit in his place and stead; rather, an Order was entered by three justices of the Supreme Court denying the Petition for Rehearing. As a result, this three-justice panel which heard the Petition was jurisdictionally and constitutionally defective.

Petitioner would respectfully submit that as a result of the failure of the Nevada Supreme Court to conform with the constitutional and statutory provisions afforded litigants

in the courts of the State of Nevada, there are two alternative remedies available to cure the defects inherent in the state proceedings. They are as follows:

1. That a district judge of the State of Nevada be designated to sit in the place and stead of Chief Justice Mowbray to hear and consider the merits of Petitioner's original Petition for Rehearing; or

2. That by virtue of Chief Justice Mowbray's voluntary disqualification, and the implied bias and partiality which that disqualification establishes, it must be concluded that the previous decision of the Nevada Supreme Court reversing the trial court judgment was tainted by such bias and partiality rendering the decision void; consequently, an entire new panel of judges should be designated to hear and consider Petitioner's original Petition for Rehearing, which would effectively remove all possible questions of impropriety and partiality.

When Chief Justice Mowbray voluntarily disqualified himself from considering the Petition for Rehearing, it was mandatory for a district court judge to be designated to sit in his place for the purpose of participating in the deliberations of the court in deciding the Petition for Rehearing. Further, it may very well have been incumbent upon the court to recognize the implications of impropriety which arose from that disqualification and thus take it upon itself to see that an entire new panel of judges was designated to hear and consider the merits of Petitioner's original Petition for Rehearing; instead, three justices summarily denied the Petition for Rehearing in their Order of July 3, 1980.

Indeed, the Nevada Supreme Court itself has in the past been faced with determining the effect of decisions made by a judge who was disqualified himself during the proceedings. In *Frevert v. Swift*, 19 Nev. 363 (1886), the Nevada Supreme Court held that the actions of a judge

involving the exercise of judicial discretion in a case where he is disqualified from acting are void, and are not merely voidable. At 19 Nev. 364, in discussing this proposition, the Court stated:

> At common law, any action upon the part of a judge interested in the cause was regarded as an error with irregularity to be corrected by a reversal of his judgment; but the general effect of the statutory prohibitions in the several states is undoubtedly to change the rule of the common law so far as to render those acts of a judge involving the exercise of judicial discretion, in a case wherein he is disqualified from acting, not merely voidable, but void.

Subsequently, in *Hoff v. Eighth Judicial District Court of the State of Nevada*, 79 Nev. 108, 378 P.2d 977 (1963), the Nevada Supreme Court affirmed the rule in *Frevert* and in citing N.R.S. 1.230 (in most part analogous to N.R.S. 1.225) stated at 378 P.2d 978:

> That the actions of a district judge, disqualified by statute, are not voidable merely, but void, has long been the rule in this state. . . .

In *Rollins v. Connor*, 69 Atl. 777 (N.H., 1908), the New Hampshire Supreme Court reversed the decision of a governmental council in which a member of the council was disqualified after his participation in the decision. The court discounted the fact that disregarding the vote of the disqualified member would have still found a majority in favor of the action. At 69 Atl. 778, the court explained its position:

> . . . but the validity of action in which an interested member takes part, when without his vote there was a regular majority in support of the action taken, was not presented or considered, but despite the Illinois case above-cited it is clear upon reason and authority that judicial action by a tribunal, one of whose members

> is disqualified to act, is voidable if the disqualified member participates therein, without reference to the fact whether the result is produced by his vote. The preliminary question whether the tribunal is properly constituted is a question which must be answered in the affirmative before there can be a decision. . . .
>
> The lack of impartiality in the tribunal arises from the participation in the proceedings as a coordinate member of the tribunal of the person disqualified to act therein, and not merely from the fact that the decision is produced from the numerical effect of his vote. The influence a party in that position might have upon the decision of his associates cannot be estimated . . . it does not appear that the plaintiff had an opportunity to object to Bruen's acting in the matter as a member of the council or that he has waived his right to object upon that ground. . . .

It should be noted that in *Rollins v. Connor*, the court found that the decision of the tribunal was voidable. In the State of Nevada, the Supreme Court has held that any decision made by a disqualified jurist is void. This reasoning is applicable to the case at bar, especially in view of the fact that the need for the Motion to Disqualify did not become apparent until after the initial decision of the Nevada Supreme Court was entered, and Petitioner SPEIRS first became aware that Chief Justice Mowbray had participated therein.

The necessity for this Petition for Writ of Certiorari arises from the fact that the Nevada Supreme Court failed and refused to correct the constitutional and statutory violation which occurred in the course of its proceedings. Accordingly, this case fails within the scope of 28 U.S.C. §1257 (3), which provides that a final judgment rendered by the highest court of a state in which a decision could be had, may be reviewed by the United States Supreme Court by

Writ of Certiorari, where any right, privilege or immunity is claimed under the Constitution of the United States. The obvious reluctance of the Nevada Supreme Court to conform its procedures to the mandates of the Nevada Constitution, and N.R.S. 1.225(5) enacted pursuant thereto, thereby deprived Petitioner SPEIRS of her right to be accorded the due process of law to which she is entitled under the Fourteenth Amendment to the Constitution of the United States.

This Court has consistently held that a fair trial and a fair tribunal is a basic requirement of due process. Moreover, a fair trial, as required by due process, requires not only an absence of actual bias on the part of the judge, but also that no man be a judge in his own case or try cases where he has an interest in the outcome. As was stated *In Re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955):

> A fair trial and a fair tribunal is a basic requirement of due process. Fairness of course requires absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.' *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the ap-

> pearance of justice.' *Offutt v. United States*, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11. (349 U.S. at 136).

In Re Murchison, and the cases cited therein, are examples of the efforts which this Court has undertaken in its attempt to protect and preserve the sanctity of the judicial process. By insisting that the fair trial element of due process requires that there not only be an absence of actual bias on the part of the judge, but also that no man be a judge where he has an interest in the outcome of the proceedings, this Court, and other diligent courts throughout the nation, have made substantial progress toward insuring that the form *and* substance of due process of law is accorded each and every litigant confronted with the necessity of preserving their rights through the judicial system.

To condone the constitutionally and statutorily defective procedures utilized by the Nevada Supreme Court would perpetrate not only a grave injustice upon the Petitioners herein, but in the long run seriously jeopardize the confidence and trust which society reposes in the judicial system. To allow the actions of the Nevada Supreme Court to go uncorrected, in the face of an admission by a justice thereof that he was biased and partial but nonetheless participated in the determination of the original decision, would imperil the belief of litigants in general that judges will do their very best to weigh the scales of justice equally between contending parties. To permit the Nevada Supreme Court to flaunt and disregard the will of its constituents as expressed in the Nevada Constitution, and the statutes enacted by the Nevada Legislature pursuant thereto, will unfortunately but inevitably allow the highest court of the State of Nevada to presume that justice need not always satisfy the appearance of justice.

Undoubtedly, the effect of the action of the Nevada Supreme Court has been extremely prejudicial to the Petition-

ers in this case. More importantly, however, to sustain those actions may very well allow the state court to continue to deny substantive rights in the future without granting a fair and unbiased consideration of the claims of litigants. To avoid this tragic possibility, the State of Nevada has enacted stringent procedural rules which reflect the important interests of the courts and litigants that a familiar, uniform and effective procedure is essential to the proper functioning of judicial administration. These rules seek to place a limit on the scope of the independence allowed to state tribunals. These limits are grounded in the specific state and federal concerns for protecting litigants from the deprivation of substantial rights without due process of law.

The deepest of these state and federal concerns for due process of law are found in the cases that establish a duty upon the state to provide a fair and impartial forum for the examination of the legitimate and substantial claims of litigants. This Court has consistently declared that the requirement of due process of law for a fair and impartial forum cannot be evaded or avoided by the type of summary action which occurred in this case.

The effect of the Nevada Supreme Court's refusal to provide a fair and impartial environment for the examination of the Petitioner's claim was to work an extreme hardship on her, especially in view of the fact that Petitioners prevailed on the merits in a lower court. This does not mean to say that after a rehearing on the merits that Petitioners would prevail; on the contrary, it is merely the Petitioner's position that she is entitled to a full consideration and reexamination of the merits of her petition for Rehearing before a tribunal that is free from actual bias or even the appearance of partiality. By so doing, this Honorable Court will have fulfilled its obligation to provide a full and fair

opportunity to the Petitioner to present her case, and thereby achieve significant progress toward restoring the confidence of litigants in their judicial system.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WIENER, WALDMAN & GORDON, LTD.,

BY LOUIS WIENER, JR.,

Attorneys for Appellants.

APPENDIX A.

Opinion.

Bank of Nevada and Diane Crandell Coulthard, coexecutors of the Estate of George William Coulthard, Deceased, Appellants, v. Karen J. Speirs and First National Bank of Nevada, successor Trustee for Karen J. Speirs, Respondents. First National Bank of Nevada, successor Trustee for Karen J. Speirs, Appellant, v. Bank of Nevada and Diane Crandall Coulthard, coexecutors of the Estate of George William Coulthard, Deceased, Respondents.

Nos. 10473, 10474.

Supreme Court of Nevada. Dec. 13, 1979.

John Peter Lee, Ltd., Las Vegas for Bank of Nevada and Diane Crandall Coulthard.

Weiner, Goldwater & Waldman, Ltd., and Gerald M. Gordon, Las Vegas, for Karen J. Speirs and First National Bank of Nevada.

THOMPSON, Justice:

These consolidated appeals are taken from a judgment imposing a constructive trust for the benefit of Karen J. Speirs upon a 12.5-percent interest in real property known as the Horseshoe Club Hotel and Casino in Las Vegas and, as well, money damages. The district court determined that George William Coulthard during his lifetime had acted improperly in discharging his responsibilities as trustee for his daughter, Karen J. Speirs, and impressed a constructive trust upon the mentioned interest in the Horseshoe Club which Coulthard had acquired in his own name and which the coexecutors of his estate, the Bank of Nevada and Diane Crandall Coulthard now hold. The coexecutors have appealed from that determination. Karen J. Speirs and the First National Bank also have noticed an appeal from a portion

of the judgment concerning money damages. We turn first to recite relevant facts.

At one time, Lena Silvagni Coulthard was the wife of George William Coulthard. Karen J. Speirs was their daughter. Lena's last will bequeathed one half of her stock in Silvagni Estate Co. which owned the Horseshoe building and land to G. William Coulthard, and the other one half to G. William Coulthard in trust for Karen. Lena died July 15, 1955. G. William Coulthard was appointed executor of her estate. An order was entered in the estate proceeding distributing a certificate for 12,500 shares of Silvagni Estate Co., 6.25-percent of the stock of that corporation, to G. William Coulthard individually, and a like amount to him as trustee for Karen J. Speirs (then Karen J. Coulthard).

The trust instrument directed Coulthard as trustee to use the corpus of the trust for the care, education, welfare and maintenance of Karen, and at his direction to use both the income and corpus for such purposes. The trustee was empowered "to buy, sell and invest with regard to the corpus of this trust, in whatever manner seems to him to be best, and I specifically provide that he may invest the same in whatever property or properties, real or personal, stocks, bonds, or evidences of indebtedenss, at his choosing." The trust was to terminate when Karen became twenty-five years old.

The Silvagni Estate Co. owned in fee simple the land referred to as the Horseshoe Properties. After Lena's death the stockholders of that company were Michael Silvagni, Victor Silvagni, Olga Silvagni, G. William Coulthard, and G. William Coulthard as trustee for Karen. In April 1961 those stockholders entered into an agreement to dissolve the corporation and distribute the Horseshoe Properties to themselves as tenants in common in the proportion that their stockholdings bore to the total stock issued. Pursuant to that

agreement Coulthard individually received a 6.25-percent undivided interest in the Horseshoe Properties and a 6.25-percent undivided interest as trustee for Karen. The agreement also contained a right of first refusal which required the party desiring to sell to "first offer his or her interest to the remaining parties to this agreement at no greater a price or more stringent terms than he or she is offered by a bona fide buyer not a party to this agreement."

In 1962, 1965 and 1967, Coulthard purchased for himself additional interests in the Horseshoe Properties. The 1962 purchase was for a 12.5-percent interest from Michael Silvagni for $250,000. The 1965 purchase was for a 7.5-percent interest from Michael Silvagni for $375,999, and the 1967 purchase was for a 5-percent interest from Victor Silvagni for $165,000. These purchases were financed through loans from the Bank of Las Vegas.

It is the contention of Karen Speirs and of First National Bank, the successor trustee for Karen, that Coulthard should have purchased one half (12.5-percent) of such additional interests in the Horseshoe Properties for the trust. The district court agreed.

Coulthard purchased five Iowa farms for the trust, one in 1961, one in 1965 and three in 1968. The acquisition price was approximately $243,146. Coulthard died on July 25, 1972. After his death, but prior to termination of the trust, Karen sold the farms for a substantially higher sum. These sales occurred in 1974. Karen and the First National Bank contend that the acquisition of Iowa farmland was an improvident investment. The district court also agreed with this contention. For reasons hereafter expressed we reverse the judgment below, since, in our view, G. William Coulthard did not breach his duty as the testamentary trustee of the trust established for Karen.

1. A testamentary trustee is a fiduciary who must act in good faith and with fidelity to the beneficiary of the trust. He should not place himself in a position where it would be for his own benefit to violate his duty to the beneficiary.

We are here concerned with a family arrangement. In establishing the testamentary trust for the benefit of Karen, Lena Silvagni Coulthard invested G. William Coulthard, her husband and Karen's father, with complete discretion as to investing the trust corpus. She specifically provided that "he may invest the same in whatever property or properties, real or personal, stocks, bonds, or evidence of indebtedness, at his choosing." This broad grant of authority, this testamentary exoneration of the trustee for mistakes, if any, must be accorded respect by a court. This would seem especially true in a family setting where it is apparent that the wife-mother wanted the husband-father to have absolute control of the trust established for the benefit of their daughter, knowing that he would act with love and care.

Wholly apart from the testamentary forgiveness of trustee liability for investments, we perceive no wrongdoing by G. William Coulthard in the discharge of his duties as trustee. Before himself borrowing money to acquire additional interests in the Horseshoe Properties he asked an investment expert whether he should purchase such additional interests for the trust, and was advised not to do so. The major asset of the trust was the Horseshoe Properties interest. The expert advised him to diversify the trust investments rather than to risk having the value of the trust corpus depend upon the the strength of the gaming economy in Nevada which, during the years in question, was in a state of fluctuation. Moreover, the trust would have to borrow substantial sums of money if it were to acquire such additional interests in the Horseshoe Properties, and the expert strongly advised against such a course of action. In

these circumstances we do not fault Coulthard for declining to purchase for the trust.

This aside, it is the position of Karen and the First National Bank that once Coulthard decided to purchase additional interests in the Horseshoe Properties for himself, he was legally obliged to purchase one half thereof for the trust, notwithstanding expert advice that it was a poor investment for the trust. We are not at all persuaded by this contention, and find no case supporting it in a similar factual context.

The rule that a fiduciary owes a primary duty to protect his trust was not violated by Coulthard. It is not per se improper to disturb the equal interests of the trust and the trustee. *Anderson v. Bean*, 272 Mass. 432, 172 N.E. 647 (1930). There, the court observed that the disturbance of the equal balance of holdings of stock by the trust and by the trustees as an individual is not, as a matter of law, apart from other circumstances, an unconscionable advantage or disadvantage.

The other circumstances here present do not suggest any impropriety on the part of Coulthard. He was advised against purchasing the additional interests for the trust and followed that advice. No loss was occasioned to the beneficiary, Karen, by Coulthard's individual acquisition of a greater interest in the Horseshoe Properties. Indeed, by his last will, Karen and Coulthard's children by his second marriage to Diane Crandall Coulthard inherit equal portions of his property including the additional Horseshoe interests. The fortuitous circumstance that the Horseshoe Properties have substantially increased in value has inured to Karen's benefit as well as to the benefit of other heirs.

As we see it, the fault with the decision below is its acceptance of the proposition that it is per se improper to

disturb the equal interests of the trust and the trustee. The court did not find that Coulthard had acted in bad faith or fraudulently. Rather, it found, in substance, that had he acquired one half of the additional Horseshoe Properties for the trust, Karen would have benefited. This finding necessarily rests upon hindsight, and gives no credence whatsoever to the expert advice which Coulthard, in good faith, sought and followed. Neither does it properly acknowledge the complete discretion granted him with regard to trust investments.

Finally, we note that the testatrix, Lena Silvagni Coulthard, created the possibility of a conflict between the trust and the trustee by her last will distributing equal interests in the Horseshoe Properties to them. In these circumstances, an absolute limitation against self-dealing on the part of the trustee is modified, and the trustee will not be penalized when he has acted in good faith and in a manner he believes was for the best interest of the trust. *In re Steele's Estate*, 377 Pa. 250, 103 A.2d 409 (1954).

2. The purchases of the Iowa farms for the trust also were within the broad investment authority given Coulthard by the trust instrument. This precludes any liability on the part of his estate.

3. The appeal by Karen and the First National Bank is in regard to the manner in which the district court computed damages due them. Since the ruling as to damages rests upon the premise that Coulthard acted improperly in discharging his duties as trustee for Karen, and since we have determined that ruling to be improper, it is apparent that there can be no damage award in any amount.

4. Other assigned errors have been considered and are without merit.

The judgment below in favor of Karen J. Speirs and First National Bank of Nevada is reversed, and the cause is remanded with direction to enter judgment in favor of Bank of Nevada and Diane Crandall Coulthard.

MOWBRAY, C. J., and MANOUKIAN and BATJER, JJ., concur.

GUNDERSON, Justice, dissenting:

I respectfully disagree with the majority opinion insofar as it declares the trustee free to take trust instrument advantages entirely for himself.

ORDER.

In The Supreme Court of the State of Nevada.

Bank of Nevada and Diane Crandall Coulthard, co-executors of the Estate of George William Coulthard, deceased, Appellants, vs. Karen J. Speirs and First National Bank of Nevada, successor Trustee for Karen J. Speirs, Respondents. No. 10473.

First National Bank of Nevada, successor Trustee for Karen J. Speirs, Appellant, vs. Bank of Nevada and Diane Crandall Coulthard, co-executors of the Estate of George William Coulthard, deceased, Respondents. No. 10474.

Filed: June 4, 1980.

Chief Justice Mowbray has voluntarily declined to participate in the resolution of this petition for rehearing, rendering moot the motion for disqualification filed by respondent Karen Speirs and First National Bank of Nevada.

The petition for rehearing is hereby denied. NRAP 40(c)).

It is so ORDERED.

/s/ Thompson, J.
Thompson
/s/ Manoukian, J.
Manoukian
/s/ Batjer, J.
Batjer

cc: John Peter Lee, Ltd., and
James C. Mahan, Esq.
Messrs. Wiener, Goldwater & Waldman, and
Gerald M. Gordon, Esq.

ORDER.

In The Supreme Court of the State of Nevada.

Bank of Nevada and Diane Crandall Coulthard, co-executors of the Estate of George William Coulthard, deceased, Appellants, vs. Karen J. Speirs and First National Bank of Nevada, successor Trustee for Karen J. Speirs, Respondents. No. 10473.

First National Bank of Nevada, successor Trustee for Karen J. Speirs, Appellant, vs. Bank of Nevada and Diane Crandall Coulthard, co-executors of the Estate of George William Coulthard, deceased, Respondents. No. 10474.

Filed: July 3, 1980

Rehearing denied.

It is so ORDERED.

/s/ Thompson, J.
Thompson
/s/ Manoukian, J.
Manoukian
/s/ Batjer, J.
Batjer

cc: John Peter Lee, Ltd.
Wiener, Waldman & Gordon, Ltd.

Supreme Court, U.S.
FILED
OCT 23 1980
MICHAEL RODAK, JR., CLERK

No. 80-469

IN THE

Supreme Court of the United States

October Term, 1980

KAREN J. SPEIRS and FIRST NATIONAL BANK OF NEVADA, successor Trustee for KAREN J. SPEIRS,

Petitioners,

vs.

BANK OF NEVADA and DIANE CRANDALL COULTHARD, coexecutors of the ESTATE OF GEORGE WILLIAM COULTHARD, Deceased,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 80-469

IN THE

Supreme Court of the United States

October Term, 1980

KAREN J. SPEIRS and FIRST NATIONAL BANK OF NEVADA, successor Trustee for KAREN J. SPEIRS,

Petitioners,

vs.

BANK OF NEVADA and DIANE CRANDALL COULTHARD, coexecutors of the ESTATE OF GEORGE WILLIAM COULTHARD, Deceased,

Respondents.

Questions For Review.

(1) Whether the Supreme Court of the United States has jurisdiction to hear this petition for writ of certiorari when the petitioners failed to present their claim of denial of due process as guaranteed by the Fourteenth Amendment to the Supreme Court of the State of Nevada.

(2) Whether the petitioners waived their right to attempt to disqualify Chief Justice Mowbray of the Supreme Court of the State of Nevada by permitting him to participate in the decisions in three prior related proceedings between the same parties.

(3) Whether the petitioners waived their right to attempt to disqualify Chief Justice Mowbray of the Supreme Court of the State of Nevada by waiting until they had filed a petition for rehearing after the court had rendered its decision adverse to them.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

BANK OF NEVADA, and DIANE CRANDALL COULTHARD, co-executors of the ESTATE OF GEORGE WILLIAM COULTHARD, Deceased, pray that this court deny the petitioners' petition for writ of certiorari.

OPINIONS BELOW.

In addition to the opinions referred to in the petition for writ of certiorari, there are several unreported orders of the Nevada Supreme Court that are pertinent. Those prior orders arose out of related proceedings between the same parties. The unreported order of the Nevada Supreme Court on October 10, 1973, in Case No. 7463, is printed in Appendix A attached hereto, infra, page 1. In that case the Nevada Supreme Court dismissed an appeal brought by the respondents herein from an order of the district court granting leave for petitioners to file a late claim in the ESTATE OF GEORGE WILLIAM COULTHARD.

The second pertinent unreported order was in Case No. 8645, and was dated February 25, 1976. That order denied a writ of mandamus sought by the respondents herein and is printed in Appendix A attached hereto, infra, page 2.

The third pertinent order arose in Case No. 10032, and was entered September 1, 1977. That order is printed in Appendix A attached hereto, infra, page 2. By that order the state supreme court dismissed another appeal that the respondents herein had attempted to bring.

STATUTES INVOLVED.

The case involves the following statutes:

28 U.S.C. §1257 provides in pertinent part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may

be reviewed by the Supreme Court as follows:

(1) . . . .

(2) . . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE.

The petitioners were plaintiffs in an action brought in state district court. Respondents, as defendants, were co-executors of the ESTATE OF GEORGE WILLIAM COULTHARD. Respondent DIANE CRANDALL COULTHARD is the widow of GEORGE WILLIAM COULTHARD.

KAREN J. SPEIRS, petitioner herein, was the daughter of MR. COULTHARD. She alleged in state district court that her father was trustee of a testamentary trust established by her mother. Her mother had owned an interest in the Horseshoe Club Hotel and Casino in Las Vegas, Nevada. Upon her death she had bequeathed one-half of her interest to her husband, GEORGE WILLIAM COULTHARD, and one-half to KAREN SPEIRS.

MRS. SPEIRS alleged that her father had invested improperly in diversifying the holdings of the trust. Instead of diversifying, MRS. SPEIRS claimed that he should have

concentrated the trust holdings in one asset, the Horseshoe Club Hotel and Casino.

The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, entered judgment in favor of petitioners on December 29, 1977. Both sides appealed from that determination.

On December 13, 1979, the Supreme Court of the State of Nevada rendered its opinion reversing the trial court and directing judgment in favor of the respondents.

During the period that this case has been pending before the lower court, MRS. COULTHARD and the BANK OF NEVADA brought three separate matters arising out of the lower court litigation before the state supreme court. The first such matter was Case No. 7463. The lower court had permitted the petitioners herein to file a claim in the ESTATE OF GEORGE WILLIAM COULTHARD, even though the time for filing claims had expired. MRS. COULTHARD and BANK OF NEVADA appealed from that decision. On October 10, 1973, the Nevada Supreme Court ruled in favor of petitioners and entered its order dismissing that appeal. Among the justices signing that order was Justice Mowbray.

The next such matter was a petition for mandamus. MRS. COULTHARD and BANK OF NEVADA had moved for summary judgment in the lower court. When that court denied their motion, they petitioned the Supreme Court of the State of Nevada for a writ of mandamus directing the lower court to enter summary judgment in their favor. On February 25, 1976, in Case No. 8645, the Nevada Supreme Court ruled in favor of the petitioners and entered its order denying the petition for writ of mandamus. Once again, Justice Mowbray was one of the justices signing that order.

The third such matter occurred when MRS. COULTHARD and BANK OF NEVADA sought to appeal from the written decision entered by the lower court following the trial of this matter. In that case, Case No. 10032, MRS. SPEIRS and FIRST NATIONAL BANK moved to dismiss the appeal alleging that final judgment had not yet been entered. The Nevada Supreme Court again ruled in favor of the petitioners on September 1, 1977, and entered its order dismissing appeal. Among the justices signing that order was Justice Mowbray.

The three appellate matters that arose pending the litigation in the lower court had several common features. Justice Mowbray was sitting at the time of each such matter, and signed the decision or order in each instance. Each such decision was favorable to the petitioners herein. Finally, petitioners made no attempt to disqualify Justice Mowbray in any of those matters.

Petitioners made no attempt to disqualify Justice Mowbray until after the Supreme Court of the State of Nevada had entered its decision reversing the lower court on December 13, 1979. Petitioners filed a petition for rehearing on December 27, 1979. They coupled that petition with a motion to disqualify Chief Justice Mowbray.

In support of their motion to disqualify, MRS. SPEIRS and FIRST NATIONAL BANK submitted two affidavits, one from MRS. SPEIRS (now known as MRS. TADSEN), and one from Elsie Hussey. In her affidavit, MRS. TADSEN alleged that Justice Mowbray officiated at her wedding ceremony; that her father, G. WILLIAM COULTHARD, informed her that Justice Mowbray was a good friend of his; and that Justice Mowbray attended either a Christmas party or New Years party at COULTHARD'S home in 1970.

Mrs. Hussey alleged in her affidavit that she was COULTHARD'S secretary; that COULTHARD and Justice Mowbray had a "warm, close" friendship; that Justice Mowbray (apparently then a district judge) was the recipient of Christmas presents that COULTHARD customarily delivered to the judges and courthouse personnel; that she "assumed" that COULTHARD and Justice Mowbray "saw each other socially"; and that COULTHARD was also friendly with Justice Thompson.

The respondents opposed the rehearing, and filed a motion to strike the affidavits of MRS. SPEIRS and Mrs. Hussey. On June 4, 1980, the Nevada Supreme Court entered an order denying the petition for rehearing with Chief Justice Mowbray voluntarily declining to participate. That order is attached at page 8 of the appendix to the petition for writ of certiorari.

The petitioners on June 11, 1980, filed a second petition for rehearing claiming that Chief Justice Mowbray had voluntarily disqualified himself and that a district judge was required to be appointed pursuant to Nevada law to sit in place of the Chief Justice. MRS. COULTHARD and BANK OF NEVADA opposed the second petition on the basis that the Chief Justice did not disqualify himself but simply declined to participate, and that three of the five members of the court had found no merit in the first petition for rehearing. On July 3, 1980, the Nevada Supreme Court denied the second petition for rehearing.

SUMMARY OF ARGUMENT.

Under statutory and case law governing the granting of writs of certiorari, the petitioners are required to establish that they set up their claim of a deprivation of their constitutional rights before the Nevada Supreme Court. They did not do so. Thus, that court was never given the oppor-

tunity to determine the claim that the petitioners present here. Accordingly, this court is without jurisdiction to consider the petition for writ of certiorari.

Furthermore, the petitioners waived their right to attempt to disqualify Chief Justice Mowbray of the Nevada Supreme Court. The petitioners were aware, as early as 1970, that Justice Mowbray was a member of the Nevada Supreme Court. While this matter was pending in the trial court, there were three appellate proceedings brought before the Nevada Supreme Court in 1973, 1976 and 1977. Each of those matters was resolved in favor of the petitioners herein. Justice Mowbray was one of the justices determining each of those matters. The petitioners made no attempt to disqualify the Chief Justice until 1979 after the court had rendered its majority opinion reversing the final judgment of the lower court. By delaying their disqualification attempt until they had filed a petition for rehearing, the petitioners waived any right to disqualify Chief Justice Mowbray for bias or prejudice.

The petitioners' position is based upon the assumption that the Chief Justice voluntarily disqualified himself. However, the orders in this case that were part of the appendix to the petition, reflect instead that the Chief Justice simply declined to participate in the determination of the first petition for rehearing. There was no disqualification nor any basis for disqualification.

ARGUMENT.

I.

The Supreme Court of the United States Does Not Have Jurisdiction to Consider the Petitioners' Petition for Writ of Certiorari Because They Failed to Present the Claim That Their Federal Constitutional Rights Have Been Violated to the Supreme Court of the State of Nevada.

Petitioners base their petition upon 28 U.S.C. §1257 (3). Petitioners claim that Chief Justice Mowbray voluntarily disqualified himself from sitting on their petition for a rehearing. Accordingly, petitioners claim that another judge should have been appointed under state law to sit in place of the Chief Justice. Failure of such an appointment supposedly deprived petitioners of their due process rights under the Fourteenth Amendment to the United States Constitution.

28 U.S.C. §1257 provides in pertinent part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . . .
>
> (2) . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> For the purposes of this section, the term "highest

court of a State" includes the District of Columbia Court of Appeals.

The language of this provision requires that the federal constitutional question be "specially set up or claimed." This court has established the principle long ago that it will refuse to consider federal constitutional issues raised for the first time on review of decisions of a state court. *Cardinale v. State of Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162 (1969).

The burden is on the petitioners to show that a federal constitutional issue was presented to the state supreme court. Otherwise, this court will presume that the state appellate court failed to pass upon the federal question because it was not properly presented. *Fuller v. State of Oregon*, 417 U.S. 40, 50 n. 11, 94 S. Ct. 2116, 2123 n. 11 (1974).

Petitioners never raised their claimed constitutional deprivation in the Supreme Court of the State of Nevada. Their allegation that the action of the state supreme court violated their due process rights under the Fourteenth Amendment of the United States Constitution surfaced for the first time in their petition for a writ of certiorari.

At page 6 of their petition, petitioners repeat their arguments presented to the state supreme court. Those arguments were based only on the Constitution of the State of Nevada and statutory law enacted by the state. Accordingly, the Nevada Supreme Court was never presented with the federal question that petitioners seek to raise here.

Petitioners failed to specially set up or claim a deprivation of their due process rights under the Fourteenth Amendment before the Supreme Court of the State of Nevada, as required by 12 U.S.C. §1257. Accordingly, this court does not have jurisdiction to consider that claim. The petition for writ of certiorari should be denied.

II.

Petitioners Waived Their Right to Disqualify Chief Justice Mowbray by Waiting to Assert Their Grounds for Disqualification Until After the Nevada Supreme Court Had Rendered Its Decision Adversely to Them.

In her affidavit MRS. SPEIRS stated that Justice Mowbray had presided at her 1970 wedding. Thus she was aware in 1970 of his judicial position. Furthermore, Justice Mowbray participated in three appellate matters that arose prior to the lower court's decision in this matter. In each of those appeals, decided in 1973, 1976 and 1977, the Nevada Supreme Court ruled in favor of the petitioners herein. Those appeals arose long after MRS. SPEIRS' wedding in 1970. Nevertheless, no attempt was made to disqualify Chief Justice Mowbray until after the Nevada Supreme Court had rendered its decision reversing the lower court and ruling adversely to MRS. SPEIRS and FIRST NATIONAL BANK in 1979. MRS. SPEIRS and the BANK then filed their petition for rehearing and at that point first raised the disqualification of Chief Justice Mowbray.

Parties may waive the disqualification of a judge. For example, in *State ex rel Warren v. District Court,* 57 Nev. 214, 61 P. 2d 6 (1936), upon different facts from the case at bar, the Nevada Supreme Court held that a party had waived his right to disqualify a trial judge. In *Kiselman v. Rautzahn,* 68 Nev. 342, 232 P. 2d 1008 (1951), the court held that an objection to a trial judge must be made prior to trial.

Other courts have recognized that a disqualification must be voiced immediately or it may be waived. For example, in *Aaberg v. District Court,* 319 P. 2d 491, at 494 (Colo. 1957), the court held as follows:

> From the record before us, we observe that the first motion to disqualify was filed fifteen months after the action was commenced. Though Rule 97 does not fix the time when a motion should be filed, good faith and orderly process dictate that if grounds for disqualification are known at the time the suit is filed and a party desires to proceed thereon, a motion to disqualify should be filed prior to taking any other steps in the case. *Failure to promptly assert known grounds of disqualification or exercise of due diligence may well constitute a waiver thereof.*
> (Emphasis added).

To similar effect, the court in *Shakin v. Board of Medical Examiners*, 62 Cal. Rptr. 274, at 285 (Cal. App., 1967), held as follows:

> It is obvious that timeliness is extremely important, . . . In other words, it would create an intolerable situation to permit an attorney or a party who knew, or claimed to know of disqualifying facts, deliberately to withhold the making of a disqualification statement until he knew that the filing of such a statement would disrupt the orderly processes of a court. Too, if disqualification is not urged at the earliest practicable opportunity, there is a waiver of such alleged disqualification.

In the present case, the movants should have attempted their disqualification prior to Justice Mowbray's considering any appellate matters and certainly before the argument of this case. They have waived any right to disqualify him by waiting to file their motion until after the opinion was rendered.

The case of *State v. Turnbow*, 195 P. 569 (Or. 1921) is directly in point. In that case, one of the litigants attempted to disqualify an appellate judge. However, the party waited until filing a petition for rehearing before objecting to the

particular justice. The Supreme Court of Oregon rejected the disqualification and held that in order to be effective any objection should have been made at the time of argument. Disqualification could not be raised for the first time on a petition for rehearing.

III.

The Cases Cited by the Petitioners Are Not in Point.

The petitioners cite two cases from the State of Nevada, *Frevert v. Swife*, 19 Nev. 363 (1886), and *Hoff v. Eighth Judicial District Court of the State of Nevada*, 79 Nev. 108, 378 P. 2d 977 (1963). Both of those cases involve judges who were disqualified from hearing a cause because of bias or prejudice. In the present case, however, the petitioners have not shown any bias or prejudice on the part of Chief Justice Mowbray. The Chief Justice was not subject to any of the statutory disqualifications of the State of Nevada. All that the petitioners showed was that Chief Justice Mowbray was to some extent acquainted with the deceased, GEORGE WILLIAM COULTHARD.

Another case relied upon by MRS. SPEIRS and FIRST NATIONAL BANK OF NEVADA is a case from New Hampshire, *Rollins v. Connor*, 69 A. 777 (N.H. 1908). In that case, two men were candidates for election to the city council in Nashua, New Hampshire. The plaintiff received more votes than his competitor. However, the moderator of the town meeting declared the latter elected. When the plaintiff appealed that decision to the city council, his competitor was permitted to take office and vote on the plaintiff's petition. The Supreme Court of New Hampshire held for the plaintiff in pertinent part as follows:

> It is equally plain that a man cannot sit in judgment to decide upon the validity of a claim against himself, or in a proceeding in which he is the defendant. The

> first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be judge and party, arbiter and advocate, in the same cause. (Ibid at 778). (Quotation marks and citations omitted).

In that case, one party held the position of being permitted to sit on a city council and rule on his opponent's petition. Thus, he was in the unusual position of being a party litigant and a judge at the same time. That case is unique and is totally different from the situation here. Furthermore, in that case the plaintiff had no opportunity to object to such procedure. In the present case, MRS. SPEIRS and FIRST NATIONAL BANK had many opportunities to object to Chief Justice Mowbray. They waited until the final decision had been rendered against them, however, before advancing their claimed disqualification.

The case of *In Re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955), cited by the petitioners, is likewise not in point. That case held that no man could judge his own case or be permitted to judge cases in which he had an interest in the outcome. There is not even the hint that Chief Justice Mowbray had interest in the present case. Accordingly, that case is not in point.

Conclusion.

For the foregoing reasons the court should deny the petition for a writ of certiorari.

Respectfully submitted,

JOHN PETER LEE, LTD.,

By JAMES C. MAHAN, ESQ.,

Attorneys for Respondents.

APPENDIX A.

Order Dismissing Appeal.

In the Supreme Court of the State of Nevada.

Bank of Nevada and Diane Crandall Coulthard, Co-Executors of the Estate of George William Coulthard, a/k/a G. William Coulthard, Deceased, Appellants, vs. First National Bank of Nevada, Successor Trustee for Karen J. Speirs formerly known as Karen J. Coulthard, Respondent. No. 7463.

Filed: Oct. 10, 1979.

This matter is before us on respondent's motion to dismiss the appeal.

The record reflects that the trial court granted respondent's motion to file a late claim against the Estate of G. William Coulthard, deceased; this is an attempted appeal from that order.

An order granting a motion to file a late claim is not appealable. NRS 155.190; NRAP 3A(b); Ontjes v. McNider, 275 N.W. 328 (Iowa 1937); In re Benesch's Estate, 240 N.W. 127 (Wis. 1932); In re Golden's Estate, 231 N.W. 833 (Neb. 1930). See O'Neill v. Dunn, 83 Nev. 228, 427 P.2d 647 (1967). We grant respondent's motion and dismiss the appeal.

It is so ORDERED.

/s/ MOWBRAY, C. J.
/s/ BATJER, J.
/s/ [Illegible], J.

cc: Hon. Leonard Gang, District Judge
Wiener, Goldwater & Galatz, Ltd.
Messrs. Lee and Beasey
Loretta Bowman, Clerk.

Order Denying Petition
For Writ of Mandamus.

In the Supreme Court of the State of Nevada.

Bank of Nevada and Diane Crandall Coulthard, Co-Executors of the Estate of G. William Coulthard, Deceased, Petitioners, vs. The Honorable Michael Wendell, Judge of the Eighth Judicial District Court of the State of Nevada, Karen J. Speirs and First National Bank of Nevada, Successor Trustee for Karen J. Speirs, Respondents. No. 8645.

Filed: Feb. 25, 1976.

The court having considered the petition on file herein, and not being satisfied that this court's intervention at this time by way of extraordinary writ is warranted, said petition is denied. NRAP 21(b). Cf. NRAP 21(a); Turner v. Fogg, 39 Nev. 406, 159 P. 56 (1916).

It is so ORDERED.

/s/ GUNDERSON, C. J.
/s/ BATJER, J.
/s/ MOWBRAY, J.

cc: Hon. Michael Wendell, District Judge
Messrs. Wiener, Goldwater & Waldman
John Peter Lee, Esq.
James C. Mahan, Esq.
Loretta Bowman, Clerk.

Order Dismissing Appeal.

In the Supreme Court of the State of Nevada.

Bank of Nevada and Diane Crandall Coulthard, Co-Executors of the Estate of G. William Coulthard, Deceased, Appellants, vs. First National Bank of Nevada, successor Trustee for Karen J. Speirs, formerly known as Karen J. Coulthard, and Karen J. Speirs, Respondents. No. 10032.

Filed: Sept. 1, 1977.

Respondents have moved to dismiss this appeal contending the order from which the appeal is taken is neither a final judgment nor an interlocutory order from which an appeal is authorized. We agree.

A final judgment is one which disposes of the issue, determines costs, and leaves nothing for future consideration of the court. O'Neill v. Dunn, 83 Nev. 228, 427 P.2d 647 (1967). Here, the case was explicitly retained in the district court for further "findings and recommendations."

Neither is the order, as appellants suggest, an interlocutory judgment in an action for partition. It is an action to require the trustee to disgorge property purchased in breach of his fiduciary duties. It cannot be dubbed an action for partition without doing violence to the long standing rule that the right to appeal is fixed by statute and there can be no appeal except as provided therein. Johns-Manville, Inc. v. Lander County, 48 Nev. 244, 229 P. 387 (1924).

Accordingly, we grant respondents' motion to dismiss, without prejudice to appellants' right to appeal after completion of the action below.

Respondents' motion for costs is denied.

It is so ORDERED.

/s/ BATJER, C. J.
Batjer

/s/ MOWBRAY, J.
Mowbray

/s/ THOMPSON, J.
Thompson

/s/ GUNDERSON, J.
Gunderson

/s/ MANOUKIAN, J.
Manoukian

cc: Hon. Michael J. Wendell, District Judge
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